

An appeal

- by -

Lemonade Gamelabs Ltd.

(“Lemonade Gamelabs”)

– of a Determination issued by –

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

and

An application for suspension

- by –

Lemonade Gamelabs Ltd.

(“Lemonade Gamelabs”)

– of a Determination issued by –

The Director of Employment Standards
(the “Director”)

pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE Nos.: 2014A/163 and 2014A/164

DATE OF DECISION: March 11, 2015

DECISION

SUBMISSIONS

Lorene Novakowski

counsel for Lemonade Gamelabs Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Lemonade Gamelabs Ltd. (“Lemonade Gamelabs”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 4, 2014.
2. The Determination found that Lemonade Gamelabs had contravened Part 3, sections 17 and 18 of the *Act* in respect of the employment of Chad Winstone (“Mr. Winstone”), Christopher Gottgetreu (Mr. Gottgetreu”) and Hyunkyu Lee (Mr. Lee”) (collectively, “the complainants”) and ordered Lemonade Gamelabs to pay the complainants wages in the amount of \$18,276.59 and to pay administrative penalties under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00. The total amount of the Determination is \$19,276.59.
3. Lemonade Gamelabs has filed an appeal of the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. In its appeal, Lemonade Gamelabs has also requested a suspension of the effect of the Determination under section 113 of the *Act* pending the outcome of the appeal. The Director has not filed an objection to this request.
4. In correspondence dated December 18, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
5. The section 112(5) “record” (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Lemonade Gamelabs, who has been given the opportunity to object to its completeness. There has been no objection to the completeness of the “record” and, accordingly, the Tribunal accepts it as complete.
6. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal by Lemonade Gamelabs and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

- 114** (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
- (a) *the appeal is not within the jurisdiction of the tribunal;*
 - (b) *the appeal was not filed within the applicable time limit;*
 - (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
 - (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
 - (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*

- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the complainants will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at whether there is a reasonable prospect the appeal will succeed.

ISSUE

8. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

9. Lemonade Gamelabs operates a digital game development company. The complainants were hired by Lemonade Gamelabs as digital artists and game developers and were employees for various periods between March 11, 2013, and July 19, 2013. The specific periods of employment for each complainant are set out in the Determination. The complainants claimed they were owed wages by Lemonade Gamelabs.
10. The Director conducted an investigation of the complaints. A summary of the evidence and argument provided by the complainants and Lemonade Gamelabs, which includes a summary of evidence provided by several persons interviewed by the Director as witnesses, is set out in the Determination.
11. The general position of the complainants was that, because of funding difficulties, they were paid only 20% of their regular wages, with an agreement that the partial wage payment was only temporary and the balance of wages owed would be paid as funding was received. Several weeks later, however, no funding had been received; Mr. Winstone and Mr. Gottgetreu decided they could no longer work for a reduced salary and needed to be laid off. Lemonade Gamelabs and those complainants agreed to terminate their employment. At the time of their termination, Lemonade Gamelabs and each of Mr. Winstone and Mr. Gottgetreu signed a Notice of Dissolution of Employment (the “dissolution agreements”). Mr. Lee quit later but signed no dissolution agreement.
12. The general position of Lemonade Gamelabs in response to the claims was that the complainants were not entitled to the wages claimed as payment of those amounts was based on receiving funding and such funding never came through. Lemonade Gamelabs submitted that Mr. Winstone and Mr. Gottgetreu had agreed to work as friends for free and accepted they would only be paid if funding materialized.
13. On November 1, 2013, the Director issued a preliminary findings letter. On November 6, 2013, the Director received correspondence from Ms. Novakowski indicating she was legal counsel for Lemonade Gamelabs and advising, among other things, that her client disagreed with the conclusions reached in the preliminary findings letter. Counsel also submitted the Director should conduct a hearing. There were a number of submissions provided to the Director.
14. In one of them, counsel for Lemonade Gamelabs provided a list of “witnesses” and suggested the Director interview them. Counsel said the witnesses would support the position of Lemonade Gamelabs. The Director was unable to contact all of the witnesses whose names were provided. The Director did speak with

two of the persons whose names were provided. Neither supported the position of Lemonade Gamelabs; both provided information consistent with the position of the complainants.

15. The Director was provided with a statement from a third person who was also named as a potential witness by counsel for Lemonade Gamelabs, but his statement was found by the Director to be hearsay and of little significance based on the absence of any involvement by him in the discussions about the payment of wages.
16. Counsel for Lemonade Gamelabs submitted the claims of the complainants should not be decided on an investigation, but only after an oral hearing. Counsel submitted there were issues of credibility that required the complainants to be heard directly and cross-examined and for other witnesses to be heard. The Director found Lemonade Gamelabs had been provided with the opportunity to know the case of the complainants, to respond to that case and to provide submissions and evidence in support of its own position. The Director found the complaints could be, and were, appropriately dealt with through the complaint investigation process and a Determination issued on the results of that investigation.
17. On an analysis of the evidence, the Director concluded the complainants had not agreed to a wage reduction of 80%, or to give up 80% of the wages they had earned, and found each was entitled to and owed wages. The amount of wages found to be owed to each complainant was based substantially on information provided by Lemonade Gamelabs and, in the case of Mr. Winstone and Mr. Gottgetreu, mirrored the amount of “back-pay” set out in the dissolution agreements between Lemonade Gamelabs and each of those two employees.

ARGUMENT

18. Lemonade Gamelabs submits the Director failed to observe principles of natural justice in making the Determination by not conducting an oral hearing of the complaints. Lemonade Gamelabs says issues of credibility required an oral hearing in the circumstances.

ANALYSIS

19. When considering an appeal under section 114 of the *Act*, the Tribunal looks at its relative merits, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
20. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was being made.*

21. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. Several principles will apply to any appeal.
22. First, an appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

23. Second, it is well established that the grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
24. Lemonade Gamelabs has grounded this appeal in an alleged failure by the Director to observe principles of natural justice by not conducting an oral hearing on the complaints before making the Determination.
25. There are two principles that are key and bear specifically on the argument raised in this appeal.
26. First, the Director has a discretionary authority to decide how complaints should be processed that cannot be interfered with or ordered by the Tribunal unless the process selected by the Director is found to contravene a legal principle: see *Director of Employment Standards and Sarmiento*, BC EST # RD082/13 (Reconsideration of BC EST # D049/13) at para. 64. The circumstances where such an order by the Tribunal could be justified would be exceptional: see *Director of Employment Standards (Re Ningfri Zhang)*, BC EST # RD635/01, and *Director of Employment Standards and Old Dutch Foods Ltd.*, BC EST # RD115/09. The burden of demonstrating a legal principle has been contravened is on the appellant, in this case Lemonade Gamelabs.
27. Second, it is well established that there is no absolute right to an oral hearing, whether before a delegate of the Director or before the Tribunal: see *D. Hall & Associates Ltd. v. Director of Employment Standards and others*, 2001 BCSC 575 and *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03. This principle applies whether or not the complaint involves issues of credibility. The Tribunal has not adopted a principle that requires credibility issues to be decided only through an oral hearing: see also *Director of Employment Standards and Sarmiento*, *supra*.
28. It follows from the above principles that Lemonade Gamelabs was not "entitled" to an oral hearing on the complaints and this appeal must fail unless Lemonade Gamelabs can demonstrate the Director contravened a legal principle by not holding an oral hearing.
29. The appeal does not demonstrate any such contravention.
30. The Director did not err in deciding not to hold an oral hearing.
31. The central point on which the argument of Lemonade Gamelabs rests is whether an assessment of its position, that the 80% of wages not paid to the complainants was agreed by them to be a permanent reduction in wages rather than a wage deferral, required an oral hearing to comply with the applicable principles of natural justice.
32. In my view, nothing in the "record" or the in the appeal dictates a conclusion, as a matter of law, that an oral hearing was necessary in order to satisfy the elements of natural justice that operate in the context of the complaint process under the *Act*. There was ample evidence provided to the Director on the central point - from Lemonade Gamelabs, the complainants and witnesses - to justify the conclusion reached in the Determination. Much of this evidence was objective: the employment contracts of each complainant, the dissolution agreements, employer payroll documents, including a detailed spreadsheet (prepared by Lemonade Gamelabs) showing wages earned, wages paid, hours worked and outstanding wages owed, written

submissions to the Director from Mr. Carefoot, the sole director of Lemonade Gamelabs, acknowledging back pay was owing to the complainants and e-mail records (particularly those dated May 7, 2013, and May 23, 2013, from Mr. Carefoot). There was also the evidence of two witnesses that was consistent with the position of the complainants.

33. Lemonade Gamelabs was provided with the degree of procedural protection required under the *Act* and by those principles of natural justice adopted and consistently endorsed by the Tribunal in the context of the complaint process.
34. In sum, I find this appeal has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
35. The appeal is dismissed.
36. Based on the finding above, the request under section 113 of the *Act* is rendered moot, although I would note that, in the circumstances, it would have been difficult to allow a suspension of the effect of the Determination.

ORDER

37. Pursuant to subsection 115(1)(a) of the *Act*, I order the Determination dated November 4, 2014, be confirmed in the amount of \$19,276.59, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

David B. Stevenson
Member
Employment Standards Tribunal